Supreme Court U.S.
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No. 02-752

In the Supreme Court of the United States

WESTAFF (USA) Inc., as Administrator of the Western Staff Services Employee Health Plan, dba Western Staff Services,

Petitioner,

v.

BETTY ARCE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 502(a)(3) of ERISA authorizes an ERISA participant, beneficiary, or fiduciary to bring an action in federal court "(A) to enjoin any act or practice which violates...the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any...terms of the plan." 29 U.S.C. Section 1132(a)(3). This section has been held both in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and in the recent case of *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), to mean that only the traditional forms of equitable relief available in equity, such as injunction, mandamus, and restitution, are available to enforce the terms of an ERISA plan. The question presented by this case is whether the Ninth Circuit Court of Appeals correctly found that Petitioner's action does not seek equitable relief where Petitioner seeks $15,000.00 in monetary damages from Respondent, and therefore properly affirmed the District Court's ruling that Petitioner's action be dismissed for failure to state a claim upon which relief can be granted.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption. The Respondent does not have any corporate affiliations.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings Below ii

Table of Contents iii

Table of Authorities v

Reasons to Deny the Petition 1

I. The Ninth Circuit Correctly Applied *Great-West Life & Annuity Ins. Co. v. Knudson*, And Petitioner Misstates The Ninth Circuit Decision In This Case 1

II. The Decision Below Does Not Conflict With the Fifth Circuit's Ruling In *Bauhaus USA, Inc. v. Copeland* 4

III. The Facts Of The Seventh Circuit Case of *Health Cost Controls of Illinois v. Washington*, Are Different From The Facts Of This Case 5

IV. The Petition Incorrectly Assumes the Petitioner and All Health Insurers Are Without a Remedy if the Ninth Circuit Decision is Allowed to Stand 7

Conclusion 9

Appendix

Appendix 1
Letter to Ms. Arce from Mitchell Melamed -
Dated 12/11/98 . . . . . 1a

Appendix 2
Letter to Ms. Arce from Mitchell Melamed -
Dated 1/19/99 . . . . . 3a

TABLE OF AUTHORITIES

Batchelor v. Oak Hill Medical Group,
870 F.2d 1446 (9th Cir. 1989) 8

Bauhaus USA, Inc. v. Copeland,
292 F.3d 439 (5th Cir. 2002) 4

Great West Life and Annuity Insurance Co. v. Knudson,
534 U.S. 204 (2002) . . . . . i, 1, 2, 4, 7

Health Cost Controls of Illinois v. Washington,
187 F.3d 703 (7th Cir. 1999) 5, 6

Mertens v. Hewitt Associates, 508 U.S. 248 . . . i, 1, 3, 4

REASONS TO DENY THE PETITION

I. The Ninth Circuit Correctly Applied *Great-West Life & Annuity Ins. Co. v. Knudson*, and Petitioner Misstates The Ninth Circuit Decision In This Case.

The ERISA statute, 29 U.S.C. Section 1132(a)(3), provides a specific remedy in an ERISA cause of action. The Court defined that remedy in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), in which it drew a sharp distinction between equitable relief and legal relief. The Court was unwilling to define equitable relief as simply "whatever relief a court of equity is empowered to provide in the particular case." *Id.* at 256. Instead, the Court referred only to the traditional equitable remedies, "such as injunction, mandamus, and restitution." *Id.* The Court further held that money damages were "the classic form of legal relief." *Id.* at 255.

The Court again addressed the question of equitable relief versus legal relief in the recent case of *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), *(Affirming the Ninth Circuit Court of Appeals)*. The Court was presented with facts identical to the instant case, namely did the Ninth Circuit err in holding that an ERISA plan cannot sue in federal court to recoup reimbursement for the medical benefits paid to a beneficiary from the settlement of that beneficiary's personal injury settlement?

In the *Great-West Life* case, the Knudsons' attorney sent the ERISA plan the settlement check it received from the third party tortfeasor's insurer. Great-West never cashed this cheek it received, instead, it filed suit against the Knudsons in federal court. In the instant case, Respondent Arce sent her settlement check to Petitioner, which Petitioner never cashed,

instead it filed suit against Arce in federal court claiming it is entitled to the whole $15,000.00. Contrary to Petitioner's assertion, Respondent Aree never agreed to have the check cashed, nor have the money placed in an escrow account pending a determination of to whom the money was owed.[1]

This Court affirmed the decision of the Ninth Circuit in *Great-West Life*, and held that what the plan sought was legal and not equitable relief. Significantly, the court disposed of the argument that the common law of trusts provides a remedy, stating, "These trust remedies are simply inapposite." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 219 (2002) In the instant case, the Ninth

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[1] Respondent disputes the allegation that the money in question is being held in some type of escrow, as Petitioner maintains. Respondent Arce wrote petitioner's counsel a letter dated November 30, 1998, requesting a reduction in the lien. On December 11, 1998 Petitioner's counsel responded in a letter stating that the figure would not be reduced, and that if Arce did not agree, the plan could terminate any further payment of her medical bills. (Respondent's Appendix 1, letter dated December 11, 1998, from Mitchell Melamed to Betty Arce.) On that basis, Respondent was compelled to send Petitioner the check for $15,000.00. On January 19, 1999, Petitioner's counsel wrote Respondent Arce stating, "As you know, we have been holding in our segregated funds account the total sum of $15,000.00." (Respondent's Appendix 2, letter dated January 19, 1999 from Mitchell Melamed to Betty Arce.) This is the first mention of what Petitioner did with the money. Certainly, there is no agreement to place the money in trust, nor is there an "escrow" as Petitioner would have this Court believe. Even the District Court stated only, "The $15,000 is being held in a trust account because Plaintiff and Defendant have not been able to reach an agreement regarding the $15,000 and Plaintiff's subrogation and reimbursement rights." Pet. App. At A-7

Circuit followed *Great-West Life*, and the holding is consistent with that case as well as with *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), in all respects, insofar as Petitioner is seeking to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim.

Petitioner misstates the decision below, painting the holding with an overly broad brush. According to Petitioner, "All that counts for the Ninth Circuit...is that Petitioner seeks to recover money." (Petition, page 2). Petitioner mischaracterizes the decision below as, "The Ninth Circuit's blanket rule that every action seeking the recovery of money under Section 502(a)(3) is necessarily legal..." (Petition, page 14). To the contrary, the Ninth Circuit took pains to look beyond the Petitioner's allegations to the heart of its claim. "In determining whether an action for equitable relief is properly brought under ERISA, we look to the 'substance of the remedy sought...rather than the label placed on that remedy.'" (Pet. App. At A-2, Citing *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n.5 (9th Cir. 1993) (citing *Mertens v. Hewitt Associates*, 508 U.S. 248, 255(1993)).

Moreover, in the case below, the Ninth Circuit clearly recognized that Petitioner was trying to distinguish the facts of this case from prior cases on the basis that the money in question has been placed in an escrow account and remains specifically identifiable.[2]

Nonetheless, the Ninth Circuit looked past the label placed on the case by Petitioner, ("[s]eeks only to recover specifically identifiable money held in an escrow account,"

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[2] A fact Respondent disputes. *See,* Footnote 1

Petition, page 7), and cited one of its own, earlier, cases, "[A]lthough they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages--monetary relief for all losses their plan sustained as a result of the "alleged breach" of the reimbursement provision." [*Citations omitted*, Pet. App. at A-3].

II. The Decision Below Does Not Conflict With The Fifth Circuit's Ruling In *Bauhaus USA, Inc. v. Copeland.*

Petitioner argues that the Fifth Circuit case of *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439 (5th Cir. 2002), is wrong, and it relies on the dissent by Judge Weiner. The dissent is not law. *Bauhaus* was correctly decided. The majority opinion relies on both *Mertens v. Hewitt Associates*, *Supra,* and on *Great-West Life & Annuity Ins. Co. v. Knudson*, *Supra.*

The majority in *Bauhaus* concluded that the facts in its case were indistinguishable from the facts in *Great-West Life*. In both, the ERISA plan administrator filed suit in federal court seeking declaratory relief that it was entitled to repayment of benefits it had conferred. In *Bauhaus*, the settlement money was placed in the court registry, and in *Knudson*, the money was placed in a private special needs trust outside the possession and control of the plan beneficiary. In the instant case, the money is being held by Petitioner in a "segregated funds account." (Respondent's Appendix 2) The point is that in these cases, neither the Copelands, the Knudsons, nor Betty Arce, are in possession of the disputed funds, a fact the *Bauhaus* majority said Justice Scalia found extremely important in the *Great-West Life & Annuity* case. *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir. 2002).

Respondent Arce is not in possession or control of the funds. Respondent sent the check to Petitioner after Petitioner threatened to terminate further payment of her medical expenses, and as the Ninth Circuit accurately pointed out in the instant case, "The beneficiary's cooperation should not now be used as a weapon by the insurance company to force the beneficiary into a lawsuit in federal court that Congress, in enacting ERISA, intended to bar." (Pet. App. at A-4). Moreover, Petitioner's misleading characterization of the money as being in trust, or in an escrow account, is self-serving, since it seeks to use that mischaracterization to bootstrap its argument that it seeks equitable restitution, in the form of a constructive trust or an equitable lien, where money is specifically identifiable. The Fifth and Ninth Circuits are in agreement that this is not allowable under ERISA.

III. The Facts Of The Seventh Circuit Case of *Health Cost Controls of Illinois v. Washington*, Are Different From The Facts Of This Case.

Petitioner argues the Ninth Circuit's decision in this case is in conflict with the Seventh Circuit decision in *Health Cost Controls v. Washington*, 187 F.3d 703 (7th Cir. 1999). Petitioner argues the facts in both cases are indistinguishable. (Petition, page 9). This is not true. Preliminarily, the court noted that the case had a tangled history that raised jurisdictional issues. Next, the district court's judgment was deemed ambiguous, as to whether it was appealable as a final decision.

In *Health Cost Controls*, the injured plan member's lawyers deposited the settlement money in an interest bearing escrow account. In addition, and very importantly, the parties agreed at the argument of the appeal, that if the appellate court affirmed the district court's judgment, then Health Cost

Controls, the insurer, would get the money sitting in escrow. None of this was done in the instant case. In the instant case, Petitioner's attorney demanded the check be sent to him, and he threatened Respondent with terminating further payment of her medical bills if that were not done. Respondent sent the check, as instructed, and she never saw it again, since Petitioner still holds the money.[3]

There is certainly no agreement between Petitioner and Respondent as to what shall become of the money held in the escrow account, as there was in *Health Cost Controls*, nor is there an escrow account.

The Court in *Health Cost Controls* stated, "Health Cost wants to get its paws on the money in the escrow account which Washington does not control. It wants a declaration that it can take to the escrow agent as proof that the agent should turn over the money to it." *Ibid.* at 707. But in the instant case, there is no escrow agent, and the money is in the possession and control of Petitioner Westaff, since it literally has its "paws" on the money. Petitioner has misled the Court regarding the status of the money in question, so that it could twist the facts of this case to fit the facts of *Health Cost Controls*, and so as to claim a conflict between the Circuit Courts, where there is none.

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[3] Apparently the money is not even being kept in an interest bearing account; only in a "segregated funds account" according to Petitioner. *See* Respondent's Appendix 2; *See also,* Footnote 1, *Supra.*

IV. The Petition Incorrectly Assumes The Petitioner And All Health Insurers Are Without A Remedy If The Ninth Circuit Decision Is Allowed To Stand

Petitioner argues the Ninth Circuit's decision will have profound adverse financial consequences for the nation's health insurance system. It argues, "If an ERISA plan is precluded from suing in federal court...it cannot simply turn around and seek redress in state court or under state law." (Petition, pages 13-14). Why not? Health insurers have always had recourse to obtain reimbursement and subrogation in state courts. Certainly there is nothing to prevent the insurer from pursuing the tortfeasor who injured the plan's beneficiary, causing the plan to pay the beneficiary's medical bills. Petitioner cites statistics from Trover Solutions which provides subrogation services for health insurers, but it does not demonstrate how many of the millions of dollars it recovered were through direct action state court claims, versus federal claims such as the instant case, therefore the figures lack relevance and are meaningless.

Contrary to Petitioner's unfounded fear mongering of a fiscal healthcare crisis lead by the Ninth Circuit, the Court has, "observed repeatedly that ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system...[and the Court has] therefore been especially reluctant to tamper with the enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text .... Indeed, [the Court has] noted that ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002), *Quotations and citations omitted, emphasis in original.*

Clearly, Justice Scalia was concerned about the availability of alternate remedies when he wrote the Court's opinion in *Great-West Life*. In that case, petitioners made the same argument being presented in the instant case. In response, Justice Scalia wrote, "In the end, petitioners ask us to interpret Section 502(a)(3) so as to prevent them from being deprived of a remedy under circumstances where such a result clearly would be inconsistent with a primary purpose of ERISA, namely, the enforcement of the terms of a plan .... We note, though it is not necessary to our decision, that there may have been other means for petitioners to obtain the essentially legal relief that they seek. We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been preempted by ERISA." *Ibid.*, 534 U.S. 204, 220 (2002); *Quotations omitted.*

Finally, it must not be forgotten that ERISA is a federal regulatory scheme enacted by Congress in 1974 as an effort to control fiduciary looting of company or union pension plans. Therefore, ERISA is remedial legislation "which should be construed liberally in favor of protecting participants in employee benefit plans." *Batchelor v. Oak Hill Medical Group*, 870 F.2d 1446, 1449 (9th Cir. 1989).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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December 11, 1998

Ms. Betty Arce
635 West Virginia
Realto, California 92376

Re: TPA of AZ/Western Staff Services/Arce, Betty
SS# 551.94.7041
Our File No: 17962203

Dear Ms. Arce:

Subsequent to your most recent correspondence of 11/30/98 I did again have occasion to speak to representatives of the Plan concerning consideration and possible reduction of monies otherwise due and owing. Because of my client's

ongoing financial obligation under the terms and conditions of the Plan, and because of the substantial amounts of money already expended by the Plan, they have chosen not to reduce the money due and owing to them. They feel that expenditure of over $42,000 to date with further exposure does not warrant any type of reduction. You should understand that the monies from reimbursement go to benefit all of the participants under the medical plan in question.

I would appreciate your signing a copy of this letter and returning it in the self-addressed stamped envelope which will acknowledge that these monies should be repaid to the Plan. Absent the same, the Plan can suspend and/or terminate any further payment of medical bills. Additionally if it is deemed necessary to file a lawsuit to disburse the funds, it will be necessary to ask that attorneys' fees, pre-judgment interest, and costs be assessed against you for having to bring a cause of action.

I do hope that you recover fully.

Very truly yours,

FRANK, MILLER, MELAMED
& TABIS, P.C.

/s/_____
By: Mitchell J. Melamed

cc: Ms. Pam Febbraro

Agreed. _____

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January 19, 1999

Ms. Betty Arce
635 West Virginia
Realto, California 92376

Re: TPA of AZ/Western Staff Services/Arce, Betty
SS# 551.94.7041
Our File No: 17962203

Dear Ms. Arce:

Pursuant to our telephone conversation of January 18, 1999, I did request that you in inform the undersigned as to how you wish to proceed with this matter. As you know, we have been holding in our segregated funds account the total

sum of $15,000 which would appear to be all of the funds recovered in this matter from all sources. This has not been confirmed in writing, which will be necessary. Assuming that this recovery is from all sources, there is an obligation to repay to the Plan any monies otherwise due you as a result of the accident in question prior to your receiving any recovery in this matter. If there cannot be agreement as to the resolution of this matter, the only remaining resolution would be to file a Declaratory Judgment action. If successful, we will request of the court that they require you to pay attorneys' fees, costs, and pre-judgment interest.

I hope to here from you upon receipt of this letter as to your wishes.

Very truly yours,

FRANK, MILLER, MELAMED
& TABIS, P,C.

/s/ _____
By: Mitchell. J. Melamed

cc: Ms. Pam Febbraro